

STATE OF MICHIGAN  
COURT OF APPEALS

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JOHN E. WOLGAST and KERRI L. YOUNG,

Plaintiffs-Appellants,

v

DAVID M. BROWN and KELLI A. BROWN,

Defendants-Appellees.

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UNPUBLISHED

October 2, 1998

No. 198029

St. Clair Circuit Court

LC No. 95-002587-CH

Before: Wahls, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

In this action involving plaintiffs' purchase of a defective home from defendants, plaintiffs appeal as of right from a trial court order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We reverse and remand.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Plaintiffs allege that the trial court erred in granting summary disposition in favor of defendants. We agree. Normally, an "as is" clause operates to waive those implied warranties that accompany the sale of property and "will impose upon the purchaser the assumption of the risk of latent defects." *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 32, n 15; 331 NW2d 203 (1982). In addition, defects that should have reasonably been discovered by the purchaser are not "concealed," and thus a vendor has no duty to disclose such defects, despite the vendor's awareness of them. *Conahan v Fisher*, 186 Mich App 48, 49-50; 463 NW2d 118 (1990). "As is" clauses, however, do not provide a defense to fraud. *Clemens v Lesnek*, 200 Mich App 456, 460; 505 NW2d 283 (1993). Here, we conclude that genuine issues of material fact existed regarding plaintiffs' fraud claim.

In order to maintain an action for fraud, plaintiffs must show: (1) That defendants made a material representation; (2) that it was false; (3) that when defendants made it they knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that they made it with the intention that it should be acted upon by plaintiffs; (5) that plaintiffs acted in reliance

upon it; and (6) that plaintiffs thereby suffered injury. *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992).

Here, plaintiffs' complaint included an allegation that defendants made "fraudulent misrepresentations" regarding the existence of a crawl space and regarding the condition of the foundation of the house. Thus, plaintiffs alleged the first four elements of a fraud claim. The complaint also contained the assertion that plaintiffs were induced to purchase the house by these misrepresentations, and that plaintiffs thereby incurred damages. Under these circumstances, plaintiffs adequately pled a claim of fraud.<sup>1</sup> As noted above, the presence of an "as is" clause in the purchase agreement in no way defeats plaintiffs' fraud claim. Thus, the trial court erred in granting summary disposition for defendants.

The trial court relied on *Conahan, supra* for the proposition that there could be no "fraudulent concealment" where the defects in the house should reasonably have been discovered upon inspection.<sup>2</sup> However, *Conahan* dealt with the question whether a seller had a duty to disclose known defects, and did not deal with a claim of common-law fraud. Whatever a seller's duty to disclose, the question whether a defect is discoverable upon inspection is essentially irrelevant to a fraud claim. Put differently, a seller may not lie about the condition of their home and then argue that the buyer should have discovered their deceit.

Reversed and remanded. We do not retain jurisdiction.

/s/ Myron H. Wahls

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

<sup>1</sup> Indeed, in their motion for summary disposition, defendants never disputed any of plaintiffs' allegations. Instead, defendants argued that, even if plaintiffs stated a cause of action for fraud, that their claim must fail as a matter of law based upon the reasoning in *Conahan, supra*. As discussed below, defendants' reliance on *Conahan* was misplaced.

<sup>2</sup> In this case, both plaintiffs and defendants concede that the damage to the property could have been easily discovered by inspection. While there is some question whether plaintiffs were given access to the "crawl space" within the seven-day inspection period, we need not address that issue.